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ABSTRACT

As new technologies find new markets, the telecommunications field must deal with definitional problems and with challenges to existing regulation. This paper looks at the fields of cable television and telecomputing, and approaches to their regulation, in order to shed light on the question of telephone companies' (telcos) potential involvement in electronic publishing. Following an introductory section, the first section deals with the First Amendment and the media. The cable television monopoly is the topic of the second section; a third section discusses telecomputing. The telephone monopoly is treated in the fourth section, and the future of electronic publishing in the fifth. The conclusion asserts that telco exclusion from electronic publishing is no longer constitutional, and that telcos should be free to enter electronic publishing with any regulations on that freedom narrowly tailored to suit the specific threats telcos pose in the communications marketplace. Fifty-seven notes are included. (SR)

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The New Marketplace of Ideas: Telco Ownership in Electronic Publishing.

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The New Marketplace of Ideas:
Telco Ownership in Electronic Publishing[1]

The modern world is one of rapid change. More than technology progresses, the industries associated with thosee technologies grow and find new markets. Telecommunications has found itself dealing with numerous definitional problems as new products and services become possible. The cable television (CATV) industry has grown from broadcast augmentation to an alternate telecommunication service. Telephone systems have also grown from message to mass data transmission. These changes in definitional characteristics have resulted in challenges to existing regulation.

Preferred Communications v. City of Los Angeles[2] attacked the assumption that a city could award a single cable franchise. Century Communications v. Federal Communications Commission (FCC),[3] gave cable operators more editorial control by removing must-carry rules which require all local broadcast stations to be carried on the cable system. The underlying authority of a city to engage in franchise at all has been questioned by a number of recent cases.[4] These challenges to regulation are based on an

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1. Authors wish to acknowledge valuable comments and suggestions contributed by Rosemarie Alexander and Dr. Thomas Muth of Michigan State University's Mass Media Ph.D. Program. Responsibility for the final contents and the opinions expressed lies with the authors.
2. Preferred Communications v. City of Los Angeles, California, 106 S.Ct. 2034 (1986). See also 754 F.2d. 1396 (9th Cir. 1985).
3. The FCC's must-carry rules were challenged and vacated in Century Communications v. FCC, 14 Med.L.Rptr. 2049, 837 F.2nd 517, (D.C. Cir. 1988), 835 F.2d 292, (D.C. Cir. 1987), and Quincy Cable v. FCC, 768 F.2d 1434, (D.C. Cir. 1985).
4. There have been contradictory opinions in lower courts as to the exact level of First Amendment protection due to the cable industry but generally since the Quincy decision opinions have favored industry freedom. See Century Federal, Inc. v. Palo Alto, California, 648 F.Supp. 1465 (ND Cal

assertion that CATV is a form of publishing. "The business of cable television, like that of newspapers and magazines, is to provide subscribers with news, information and entertainment" argues Preferred. This editorial discretion would "seem to implicate First Amendment interests."[5]

In addition to CATV, telephony has found its own voice as data communication systems become a practial reality. Teletext, videotex, tele-informatics, HCIS and information services are all terms used to describe the synergistic combination of computer and telecommunication technologies that this paper will call telecomputing.[6] This new and unique medium of communication may provide information and entertainment over a relatively abundant channel -- certainly implying First Amendment protection. If electronic publishing is a form of free expression protected by the First Amendment, the government must demonstrate some provable reason to regulate that form of communication. The metamorphosis of telecommunication systems into electronic publishing has produced an equal change in legal interpretation which, in turn, produces rippling effects throughout telecommunications.

1986). Pacific West Cable v. Sacramento, California, 798 F.2d 353 (9th Cir. 1986). Group W Cable v. Santa Cruz, 14 Med.L.Rptr. 1769 (ND Cal 1987).

5. 106 S.Ct. at 2037.

6. Teletext and videotex are services that use a home television screen as a display device (Aumente, Jerome, New Electronic Pathways, Newbury Park, CA: Sage Publications, 1987). Tele-informatics is a synergistic combination of telecommunications and information science (Rosenberg, Jerry M., Dictionary of Computers, Information Processing & Telecommunications, New York:John Wiley and Sons,1987). HCIS (In-Home Computing and Information Services) describe the convergence of computers, communications, computer applications and advanced electronic consumer technologies (Vitalari, Nicholas P. and Alladi Venkatesh, "In-home Computing and Information Services," Telecommunications Policy, March 1987: 11:1, 65-81 1987).

The FCC is considering whether telephone companies (telcos[7]) should be restricted from entering CATV in order to preserve an environment that encourages competition.[8] At the same time, U.S. District Judge Harold Greene, architect of the 1982 AT&T divestiture, has repeatedly denied the Bell regional holding companies permission to offer information services.[9] Greene warned that telcos could act in an anti-competitive manner. The FCC and Greene are asking if telcos should enter electronic publishing. The question, however, should be, if there is sufficient reason to not allow telcos free expression. The difference in these two approaches is more than an exercise in semantics. It is the difference between the approach that has been taken to telco regulation (deregulation) and the approach a court should take in deciding a First Amendment case involving telcos. This paper will look at these changes in light of telco's potential involvement in electronic publishing.

It may appear on the surface that this paper has a dichotomous intent. After all, fields of telecomputing and CATV seem, at best, distantly related. But they do share two important common threads. Telecomputing and CATV have both been defined by the courts as deserving some level of First Amendment protection and telcos may not enter the market.[10] The different media may involve separate sets of associated problems, but as challenges to regulation develop, a similar level of review may be used. Like cable, telecomputing is a medium deserving First Amendment protection.

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7. As used herein, the term "telcos" (telco:singular) refer to American Telephone and Telegraph (AT&T) and affiliate companies subject to the judgment often called the Modified Final Judgment found United States v. American Telephone and Telegraph, 552 F.Supp. 131 (D.D.C. 1982).
8. Notice of Inquiry "In the Matter of Telephone Co. Cable Television Cross-Ownership Rules" 77 RR 2d 1 (1987) at 4. See also 53 FR 38042.
9. Charles Mason, "Greene rejects Bell Info Plans, Harshly criticizes companies," Telephoney , (June 19,1989), 10.
10. Telcos can enter electronic publishing, in some cases, to the point of providing systems for others to operate but they can not originate their own messages. See United States v. Western Electric 673 F.Supp. 525 (D.D.C. 1987) at 602.

The First Amendment and the Media

Communication is a package of two interdependent goods -- the medium and the message. The First Amendment has been used to encourage the production of one good, the message, by the regulation or deregulation of the other, the medium. Yet no matter how clear the First Amendment is in print, its application has historically been anything but a well-defined process.

Before the electronic age, the two communication goods were almost inseparable -- the editor of the newspaper did the writing or controlled the writer. It was not possible to place too many restrictions on the medium without affecting the production of the messages. Today's newspapers contain a collection of messages from various sources, yet editors maintain that the entire newspaper is a form of expression. The tradition of press freedom continues for the compilation product of current newspapers in what the cable industry calls the "press model of regulation."[11]

Broadcasting created an industry that was national in scope but limited in number. In a 1943 case, NBC v. United States,[12] the U.S. Supreme Court accepted the FCC assertion that concentration of media ownership and the power of the networks should be regulated. Red Lion Broadcasting v. FCC[13] went further to say that the scarcity of the broadcast spectrum justified FCC control over both ownership and content. NBC and Red Lion created the

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11. The press and broadcast model of regulation is one of the two basic models of First Amendment protection that may be applied to cable. It has been considered by almost every court in deciding cable cases since 1984.
12. NBC v. United States, 319 U.S. 63 (1943).
13. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

broadcast model of regulation. Under this model, the scarcity of cable systems a city can support is analogous to the scarcity of broadcasters the spectrum can support. United States v. Southwestern Cable[14] termed CATV as "reasonably ancillary" to the objectives of the FCC as to justify regulation. CATV was to be regulated like broadcasting. Since there could be only one CATV system in a city, that system must give up some freedom to provide service in the public interest.

In the same year as Southwestern the Supreme Court in United States v. O'Brien[15] said that when speech and nonspeech elements are combined in a single action, government intervention is permissible provided that: 1) the regulation is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) the interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedom is no greater than the furtherance of that interest.[16] Although O'Brien actually denied a speech-action claim, this test has been used successfully in the elimination of cable regulations such as must carry rules and, more recently, to challenge major elements of the franchising process.[17] In effect, decisions such as Red Lion and Southwestern have been used to justify message regulation due to the scarcity of the medium.

Under the broadcast model, CATV companies have operated under the restraints of extensive local and federal regulations. The Cable-Telecommunications Policy Act of 1984[18] was the first real legislative step toward a less-regulated cable industry. Yet, even this change in cable

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14. United States v. Southwestern Cable, 392 U.S. 157 (1968).
15. United States v. O'Brien, 391 U.S. 367 (1968).
16. Ibid., 377.
17. Century Communications, 14 Med.L.Rptr. at 2054. Group W Cable 14 Med.L.Rptr. at 1774. Preferred Communications 754 F.2d at 1405.
18. 47 U.S.C. Sec. 151 et seq., 601, 623-26 (1984)

regulation[19] has come under attack from cable companies as being overly broad and therefore unconstitutional. Since the Cable Act, such court decisions as Preferred and Century Communications have served to give cable companies increasing freedom under the First Amendment. The expanded First Amendment protection comes from applying a print model of regulation. This model is the antithesis of the broadcast model because cable companies have been able to convince courts that regulations are not appropriate to the CATV. The print model rejects the assumption that a city can support only one cable system, so CATV should not be treated as a regulatable medium.

The Cable Television Monopoly

One of the most common arguments for the protection of the cable industry is the contention that cable is a natural monopoly.[20] A natural monopoly exists when one firm can produce the total industry output more economically than two. This argument has two variations. The first is that two companies could not afford to compete in a single market (economic monopoly). The second is that the ability to send cable to every household would be limited by the physical capacity of the utility poles and underground throughways. Neither argument is adequately supported by practical evidence, and the two arguments work in opposite directions. The economic argument warns of an eventual monopoly service, while the physical capacity argument warns of too many services.

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19. Ibid.
20. George H. Shapiro et al, CableSpeech: The Case for First Amendment Protection (New York: Harcourt Brace Jovanovich, 1983).

In Miami Herald Publishing v. Tornillo,[21] the Supreme Court rejected the economic scarcity rational for regulating newspapers. The Court acknowledged that "The First Amendment interest of the public being informed is in peril because the 'marketplace of ideas' is today a monopoly"[22] but that "press responsibility is not mandated by the Constitution and like many other virtues it can not be legislated."[23] Similarly, CATV companies should not be put under the heavy hand of expensive regulations simply because the government does not believe competition is strong enough.

The physical capacity argument is weakened by introduction of lighter and higher capacity coaxial and fiber optic lines, but even without better cables underground conduits can be made larger and utility poles more secure. In areas where a physical barrier to cable does exists, microwave or other radio frequencies might be employed. If these plans to overbuild sound grandiose, it is important to remember that a private company is taking on this burden and the economies of scale are much like any company in a competitive market.[24]

From a purely technical standpoint, it is important to carefully define scale economies. Within a physical plant size or service area, it is probably possible to obtain an ever-diminishing economy of scale, but there is an optimal plant size. Using today's technology, after a certain point it is just as cheap or cheaper to build a second CATV plant than it is to extend the first into a new area.

If the argument is accepted that two CATV services are wasteful, it must be accepted that two telecommunication delivery services are equally wasteful. If

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21. Miami Herald Publishing v. Tornillo, 418 U.S. 214 (1974).
22. Ibid., 251.
23. Ibid., 256.
24. Thomas W. Hazelett, "The Policy of Exclusive Franchising in Cable Television," Journal of Broadcasting & Electronic Media, 31:1 (1987).

the assumption is that the delivery of home telecommunication is one good and duplication is wasteful, then one regulated company should be charged with the duty of all home telecommunication delivery (telephony, data and audio-video services). Rather than paying CATV companies for a package of services, subscribers would pay channels directly on a pay-per-view basis. Unwilling riders would be virtually eliminated since attributable costs would be closely associated to consumption.[25] Under this plan, regulators would choose between the greater capacity of cable's broadband lines and the higher penetration provided by telco's universal service. The companies would either have to merge or one would leave the telecommunication delivery market.

The provision of any service by a monopoly carrier poses regulatory difficulties not present in a competitive market. Mark Fowler, former FCC chairman, outlined six costs of regulating the telephone industry as a natural monopoly: 1) distorted investment decisions with limited incentive to innovate; 2) discouraged price competition; 3) limited ability to respond to market changes; 4) prices charged are ultimately artificial; 5) substantial resources are spent on administration; and 6) system prevents testing of the central premise, that telecommunications is a natural monopoly, by creating barriers to entry.[26] Although this list was intended to describe the telephone industry, it is equally applicable to any regulated monopoly service. An unregulated monoply would amplify these problems by replacing (hopefully) benevolent public oversight with simple maximization of profits. Recent court

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25. Unwilling riders are those people that must, for whatever reason, pay for services that they do not desire.
26. Mark S. Fowler, "Back to the Future," Address before the Communications Network 1986 Conference, Jan 29, 1986, as quoted by Stuart N. Brotman ed, The Telecommunications Deregulation Sourcebook (Boston and London: Artech House, 1987). See also 38 Federal Communications Law Journal 145 (1986).

decisions (see above) seem to indicate that a regulated CATV monopoly is not likely. The optimum choice would, therefore, be to move toward a competitive market.

Unfortunately, many regulators see CATV as a service roughly equivalent to utility service. CATV, like electricity and telephony, is delivered to individual homes by means of a wire. Once that infrastructure is put into place there is very little additional cost associated with adding users. There are, however, two main differences between CATV and electricity or telephony: 1) the separability of the good from its delivery system; and 2) quality characteristics of the good.

CATV is primarily a delivery system for a package of goods. Electric and telephone companies not only deliver a service but produces a product as well. Although energy can be delivered by other means (e.g., batteries), the most efficient means of delivery (cost/output) is via the scale economies created by the power company and its associated network. Telephone service, on the other hand, offers communication. The marginal cost of another user is at least partially offset by the marginal utility to existing users. A competing telephone system would reduce marginal utility to some users by at least fifty percent. Unlike CATV, the quality factors associated with electricity and telephony are fairly arbitrary to the home user (e.g., 60 hertz electricity or 4 kilohertz voice bandwidth[27]).

Most of the programing delivered by CATV have achieved scale economies independent of the local system. Except for scale economies, there is no utility gained for existing CATV users from additional users — it is not necessary for us all to be on the same CATV system. Yet, CATV is a good

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[27]. Proposed advancement in telephone technology may become more important to users as quality factors (e.g. electronic mail) but currently electricity and telephony are relatively standardized products.

with a high degree of interdependence. That is, people must accept the total (basic) service or nothing at all. Decisions such as cost structure, number and type of programming services, and quality of signal require a centralized decision. Anyone who prefers a different mixture will not be completely satisfied. Prior to about 1984, the local government body was allowed to dictate most qualities of the CATV service --hopefully representing the majority of the users. Since that time, CATV companies have exerted their rights as electronic publishers to determine most of the quality decisions. The corporate managers are more likely to understand the business of media delivery, while the community leaders are probably more benevolent toward receivers. CATV deregulation typically moved monopoly decision making from a small group of community leaders to a small group of corporate managers. Neither decision-maker is clearly superior.

The interdependent nature of CATV begs questions such as "Are there better means to define a CATV market than by political boundaries?" or, "Can the optimally designed CATV system effectively serve the poor of the inner-city and affluent of the suburbs?" Most cities are composed of a divergent population with an equally divergent set of needs and preferences. An efficient system in one area of the city may be far too simplistic for another. The interdependent nature of CATV necessarily creates a number of unwilling riders (people paying for a service that is less than optimum) and left-behind riders (people who must do without due to unacceptable mixture of service price and quality).

In a community-wide system, part of the rate structure must deal with the allocation of marginal cost. Most franchise agreements require fixed rates community-wide for installation and monthly service. Fixed rates are based loosely on the precedent of utility pricing and can have a redistributive effect.

In utility service, the city needed to subsidize county residents in order to ensure universal service for electricity or telephony. CATV, on the other hand, makes no attempt to provide universal service. The fixed rate schedule causes apartment dwellers and others who live close together (with a lower marginal cost) to subsidize the suburban homeowners (who require more cable, power, travel time and frequently expensive underground installation).

CATV is aided by economies of scale. It is cheaper per home for CATV to serve a thousand homes than one. Does CATV have an ever-diminishing economy of scale, or is it always cheaper to produce an extra unit of output? Like all joint-impact goods, CATV has an ever diminishing economy of scale across a certain range.

Despite ever diminishing costs within many CATV service areas, competition may still be supportable. There are few (if any) areas of the country where one-hundred percent of homes passed by cable actually subscribe. An overbuilder may take some of the incumbent's customers, serve the market niche that is left or some combination. Overbuilding a CATV provides potential subscribers with a larger opportunity set. They may subscribe to service A, B or none at all. Community regulation could would largely be replaced by the competitive drive of the two cable companies. Since the absolute area penetration may be increased by more people getting their first choice, the incumbent company may overbuild itself. A company providing multiple competing joint-impact goods is not without precedent. If traditional CATV logic is applied to the movie industry, cinemas would reduce cost by building only one theater and showing only one movie at a time.

Another possible option for an overbuilder is to define its market a little more carefully than by political boundaries. Many cities are rather heterogenous, and it is reasonable to expect that their desires for CATV

should be as well. Since most CATV programing is paid on a per-subscriber basis, the efficient CATV company would narrowly tailor its service to conform to the desires of definable markets. The poor of the inner city could reasonably be offered an efficient service with few channels while the more affluent suburbanites could be offered an extensive service. If the CATV company fails to provide acceptable service, the market will be open to new competition.

CATV, as a delivery vehicle, is one one potential option. If CATV is defined as a monopoly service today, it will have to be protected as a utility. Other options, such as multichannel television (MCTV), low power television (LPTV), direct broadcast satellite (DBS), home satellite dish (television receive only or TVRO), videocassette recorders (VCR) and satellite-master antenna (SMATV)[28], may have to be supressed in deference to the CATV utility. If CATV were alone in the world of televised entertainment delivery, a natural monopoly argument might be realistic. But cable is not alone, and it is facing increasing competition from other delivery vehicles. To continue to control CATV as a natural monopoly when it will be facing a market that is not monopolistic will do a disservice to all media companies and will soon become counterproductive.

Telecomputing

More than technologies are converging in the telecommunications marketplace. Incompatible regulatory structures are converging as the

28. These technologies are a part of the ever growing video market. MMDS, DBS, TVRO and SMATV deliver services that look very much like cable television to the home viewer.

monopolistic telephony, the competitive computer and the mixed regulation of audio/video marketplaces converge.[29] What has been called deregulation amounts to application of regulatory structures to previously non-existent industries.

Electronic publishing via telecomputing has become a regulatory anomaly. Policy makers have concentrated on the data to the neglect of the communication. As a result, related policy has been misdirected toward the creation of a utility rather than a medium. Because of the efficiency of telecomputing it may soon be one of the most available and accessible forms of media.[30] Many of the telecomputing systems provide open forums for comment that are a true marketplace of ideas. Although the original 'marketplace' may have been the streetcorner or town halls,[31] the forums on electronic bulletin boards and information utilities provide a very similar opportunity for all to express their ideas, hear new ideas and respond to those that seem false.[32] Accessibility gives inherent value to these systems. A data system can draw people from around the corner to around the world for the exchange of ideas and information limited only by the imagination of users.[33]

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29. Robin E. Mansell, "Telecommunication Network-based Services," Telecommunication Policy, 12 (September, 1988), 243-55.
30. Common carriers must carry messages from anyone with the ability to pay (e.g. telcos). Noncommon carriers are allowed a much greater discretion and often produce their own messages (e.g., broadcast stations).
31. Abrams v. United States, 250 U.S. 616 (1919).
32. Steven J. Dick, The Diffusion of Videotex Technology: A Survey of Users, unpublished Masters thesis, Southern Illinois University, Carbondale, IL. (1986).
33. The diversity of data communications systems can be found generally in Elizabeth M. Ferrarini, Infomania: The Guide to Essential Electronic Services, (Boston: Houghton Mifflin Co., 1985) and Alfred Glossbrenner, The Complete Handbook of Personal Computer Communications, (New York: St. Martin's Press, 1985).

The Telephone Monopoly

The 1956 Consent Decree, which settled a 1949 antitrust suit against Western Electric,[34] restricted AT&T and its subsidiaries to offering only common carrier communications. Yet, within the common carrier marketplace, AT&T grew at such a rate that a 1974 antitrust suit resulted in a 1982 Consent Decree to break up the traditional phone company into several smaller units.[35] An integral part of the latest Consent Decree was that telcos would give up part of the monopoly in exchange for the opportunity to compete in new markets.[36] The increasing use of transparent technology has muddled the distinction between data producing equipment and communication equipment.[37] This distinction remains important since it is also a rough divider of the markets available to telcos.

It can be argued that telcos are involved in the information marketplace because they are carriers of so much information. The problem with this argument is that as a common carrier they are strictly limited in the creation of expression and the exercise of editorial control. Judge Greene recently opened the door to transmission of electronic information but denied entrance into the more lucrative business of providing content. The disparity here is that telcos can transmit—for a profit—anyone's information but their own.[38]

Media cross-ownership restrictions are common, but these rules, prohibiting ownership of two media within a market, were intended to make

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34. United States v. Western Electric, Civil Action No. 17-49 (D.N.J. filed Jan 14, 1949). See 522 F.Supp. at 140-41, 144 n.51.
35. 552 F.Supp 131
36. Harry M. Shooshan III (ed.), Disconnecting Bell; The Impact of the AT&T Divestiture (New York:Pergamon Press, 1984).
37. As used herein, "Transparent technology" is the use of technical advancements in such a way not noticeable to the users. (e.g., pen registers, a business telephone system that records employee's calls)
38. United States v. Western Electric, 673 F.Supp 525 (D.D.C. 1987).

room for more voices.[39] Although the telephone may be considered a medium of communication, it is not a mass media of expression like broadcasting and cable. With telcos, it has been assumed that their size and current business activities pose a threat large enough to warrant their total exclusion as electronic publishers. The Cable Communications Act of 1984 expressly stated that cable was not a common carrier,[40] yet cable companies may provide common carrier services such as home banking, alarm services and telecomputing.

The contention that the pure size of telcos presents a threat to CATV is not supported by media precedent. Telcos are big companies. The smallest telco is much larger than the largest CATV company, but the largest communication company is neither cable or telco. According to Business Week, General Electric, owner of the NBC television networks, is the twelth largest company worldwide as compared to AT&T which is sixteenth and Bellsouth, the largest Bell regional holding company which is thirty-second.[41] The size of General Electric has not eliminated that company from media owership, and neither should the size of other companies.

Telcos are allowed limited participation in electronic publishing under two conditions. First, they may build CATV systems outside of their telephone service areas. Second, telcos have been allowed to provide CATV in rural areas that other companies have rejected. These restrictions impose a disadvantage for the telcos alone. Even though a forum is possible in one area, telcos must go to another area to exercise their rights of free expression.

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39. 100 FCC 2d 17, 55 RR 2d 859 (1984).
40. 47 USCA 621, Sec. 621.c.
41. Busness Week, July 17, 1989 139-178.

Unlike other cross-ownership restrictions, telcos do not already have a similar forum for expression in the area.

This exclusion is opposite normal regulatory schemes where one player is limited to allow another player an opportunity (maximum ownership rules) or the best player is chosen to fill a limited resource (broadcast licensing). It seems it would be very difficult to justify, even at the more stringent broadcast model of cable regulation, the complete exclusion of better qualified candidates due to the fear that they may be the most effective voice.

In Near v. Minnesota,[42] the Supreme Court ruled that suppression of a publisher based on what that publisher might do is an unacceptable prior restraint. The exclusion of telephone companies from electronic publishing is a similar prior restraint. There may be sufficient reason to limit telcos' entrance or ownership in electronic publishing but that is not what is being considered. Telcos have been denied access to electronic publishing based on a fear that they may extend (or reconstruct) their monopoly. Applying the test provided by O'Brien,[43] that the government may regulate speakers only as required to further its interests, it is a reasonable interest of government to limit the extent that one person or company may control speech activities, but it is far beyond that interest to completely exclude a speaker.

The Future of Electronic Publishing

Telcos' entrance into electronic publishing may have a profound effect on the industry as would the entrance of a any major player. In preparation, the

42. Near v. Minnesota, 283 U.S. 697 (1931).
43. 391 U.S. at 377.

first step should be a formulation of policy. Should telcos be the single telecommunication carrier as discussed above? Should maximum ownership rules be applied to telco involvment? Should different standards be applied to CATV and telecomputing? These are questions that should be addressed today.

The single telecommunication delivery company may be a fanciful idea on paper but most likely unworkable in practice. The political power held by large multiple cable systems operators (MSOs)[44] and long-term contracts with numerous cities would make the plan nearly impossible to implement.

A maximum ownership policy will have to be outlined to define the extent that any one company may dominate electronic communication. This may be done on an industry-by-industry basis (e.g. maximum ownership of cable systems) or a comprehensive policy of maximum ownership of mass media as a whole (including cross-ownership rules). A maximum ownership policy could put realistic limits on telco domination of electronic publishing and take away a great deal of incentive for monopolistic activity. Such a policy may require divestiture within the largest MSOs. This could open up the market for an even broader participation in electronic publishing as a whole.

Because telecomputing is delivered by a variety of channels, it may be more difficult to define an acceptable maximum ownership policy. Still, a definition of maximum ownership may be more practical to administer than the current maze of approving or disapproving new telephone services on an almost individual basis.[45] Entrance of telcos may bring the market power

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44. As used herein, "MSO" or "Multiple System operator" are companies that own more than one cable television franchise.
45. See generally, Computer and Communications Industry Association v. FCC 693 F.2d 198 (D.C. Cir 1982) known as Computer Inquiry II. See also "Third Computer Inquiry" 60 RR 2d 603 (1986) and "Third Computer Inquiry (Reconsideration)" 62 RR 2d 1594 (1987).

needed to set an industry standard and encourage further development of telecomputing as a whole.[46]

The franchise fee is a more difficult problem. There are two competing interests, the rights of cities to be compensated for a valuable public property (the right-of-way)[47] and the rights of cable companies to distribute programming without undue taxes.[48] It is difficult to predict the interpretation of the courts on this point and its eventual impact. If more cable companies are using the city's right-of-ways the franchise fee may actually increase.

An analogous situation to cable franchise has been considered and disallowed by the Supreme Court. In City of Lakewood v. Plain Dealer Publishing,[49] the city of Lakewood, Ohio, passed an ordinance providing for the rental of city sidewalks to coin-operated newsracks. In addition to the rent, the publisher was to submit the newsrack for a city architectural review and provide insurance. The city could reject the publisher's application for: 1) health or safety reasons; 2) interference with public use of the property; or 3) failure to apply recognized architectural principles. These regulations on newsracks are similar to the regulations imposed on CATV. By striking down the Lakewood ordinance, the Court placed a real restriction on cities' ability to regulate media delivery systems.

If franchise fees are not constitutional, cable companies may face a different problem. Cities may be reluctant (or unable) to condemn right-of-way for multiple cable systems to cross private property. Cable companies may be forced to lease or buy right-of-way into apartment/condominium complexes or pay to cross property otherwise too difficult to build around.

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46. 673 F.Supp. at 590-603.
47. Erie Communications v. City of Erie, 62 RR 2d 1467 (WD Pa 1987) at 1481.
48. Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983).
49. City of Lakewood v. Plain Dealer Publishing, 13 Med.L.Rptr. 1065 (6th Cir. 1986)

The question of whether telcos' telephone right-of-way constitutes an assumed cable right-of-way will have to be answered. Telcos and incumbent cable operators, who already own right-of-ways, may pose an unfair advantage to other companies wishing to provide cable service. This will have to be controlled.

The current tactic of overbuilders is to attack a specific area underserved by the incumbent cable operator.[50] Total overbuilding does not seem as attractive as offering alternate services. Because incumbent operators are already in place, the city-wide cable service may compete with neighborhood systems. These neighborhood systems may be nothing more than overgrown SMATV,[51] which offer a specifically tailored, simplified service. The city-wide system, with a larger economy of scale and interconnection with other systems, will be better able to handle a more expansive service and telecomputing.[52] The effect of Century Communications, giving cable operators more editorial control over content, may cause city-wide operators to scale down their service or to offer different services in different areas.

There is a reasonable fear that telcos could dominate telecomputing since much of it is carried by standard phone lines. The other side of this argument is that without telco involvement telecomputing is having trouble gaining any kind of a popular foothold in this country. Greene, in his recent decision to keep telcos out of telecomputing, felt that the competing social interests were "prevention of monopolization of information services versus broad

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50. Stoddard supra note 34.
51. SMATV, Satellite Master Antenna Television, are cable-like systems normally found in apartment complexes that currently do not cross public right-of-ways.
52. Data communications, to be truly effective, must have the greatest amount of interconnection possible. Forrest P. Chrisman, "Beyond Deregulation: Communications Policy and Economic Growth," Journal of Communications 32:4 69-83 (1983).

availability of such services."[53] His guide for what could be accomplished in America, the French Minitel videotex system, uses terminals costing $100 to $150 each, has some three million subscribers and immediate access to more than four thousand independent services.[54] What Greene overlooks is that his examples of successful systems (in France and Japan) all allowed the central telephone company to supply information services.[55]

Conclusion

The market for telecommunications has changed and regulation must keep up with those changes. The rules excluding telco ownership in CATV were created by the FCC in the early seventies when CATV was a simple recarrier of broadcast stations. Since that time cable has moved into larger markets, developed specialized programing and become a stronger, more competitive industry.[56] CATV is not the same medium it was when the rules were created. It is no longer an alternate delivery system. It is a separate medium of communications. Red Lion mandated that different media should be treated differently, so cable communication should be treated differently today than it was in 1971.

Not only is telco exclusion from electronic publishing no longer necessary, it is no longer constitutional. The exclusion of an able speaker from the marketplace of ideas based simply on what that speaker may do is an

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53. 673 F.Supp. at 603.
54. Ibid.
55. Telephone Companies in France and Japan are operated by the government so they are not under the same pressure to make large profits.
56. 77 RR 2d. at 4-5.

unwarranted intrusion of First Amendment freedoms. The FCC has maintained maximum ownership rules for broadcast allocations, and First Amendment protection does not immunize a speaker from antitrust regulations.[57] If there is sufficient reason to believe that any one company may monopolize communications, regulations should written to directly and narrowly control this problem. We cannot apply the First Amendment protection to CATV and telecomputing while restricting telco ownership in those industries. Telcos should be free to enter electronic publishing with any regulations on that freedom narrowly tailored to suit the specific threats that they pose in the communications marketplace.

57. Associated Press v. United States, 326 U.S. 1 (1945).